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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
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10 LIGHTHOUSE FOR THE BLIND AND
11 VISUALLY IMPAIRED, et al.,

12 Plaintiffs,

No. C 12-0195 PJH

13 v.

14 REDBOX AUTOMATED RETAIL, LLC,
15 et al.,

**ORDER DENYING MOTION TO
DISMISS**

16 Defendants.

17 Before the court is the motion of defendant Save Mart Supermarkets for an order
18 dismissing the claims asserted against it for failure to state a claim. Having read the
19 parties' papers and carefully considered their arguments and the relevant legal authority,
20 the court hereby rules as follows.

21 Plaintiffs in this proposed class action assert disability access claims under federal
22 and state law against defendants Redbox Automated Retail, LLC ("Redbox") and Save
23 Mart Supermarkets ("Save Mart"). Save Mart is a chain supermarket that operates
24 numerous stores in California. Redbox rents DVDs to consumers from self-service kiosks
25 that are installed in various locations, including in approximately 200 Save Mart
26 supermarkets in California.

27 Plaintiffs allege that the Redbox kiosks – which utilize a touchscreen that cannot be
28 navigated by anyone who cannot see it – are inaccessible to blind and visually impaired

1 individuals. Plaintiffs assert a claim against both defendants under ADA § 302(b)(1), 42
2 U.S.C. § 12182(b)(1)(A)(i), (ii) (denial of opportunity to participate in or benefit from the
3 goods, services, facilities, privileges, advantages, or accommodations of an entity, and
4 denial of opportunity to participate “equal to [the opportunities] afforded to other
5 individuals”); and also under ADA § 302(b)(2), 42 U.S.C. § 12182(b)(2)(ii), (iii) (failure to
6 make reasonable modification and failure to take steps to ensure disabled persons are not
7 excluded).

8 Plaintiffs also assert causes of action under California Civil Code § 51, et seq. and
9 under California Civil Code §§ 54-54.3, as well as a claim for declaratory relief. Plaintiffs
10 primarily seek injunctive relief “requiring [d]efendants to take the steps necessary to make
11 Redbox kiosks . . . readily accessible to and usable by blind and visually impaired
12 individuals.”

13 Save Mart now seeks an order dismissing the claims asserted against it, pursuant to
14 Federal Rule of Civil Procedure 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests for
15 the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d
16 1191, 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint.
17 Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995).
18 To survive a motion to dismiss for failure to state a claim, a complaint generally must
19 satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8.

20 Rule 8(a)(2) requires only that the complaint include a “short and plain statement of
21 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Specific
22 facts are unnecessary – the statement need only give the defendant “fair notice of the claim
23 and the grounds upon which it rests.” Erickson v. Pardus, 551 U.S. 89, 93 (2007) (citing
24 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

25 All allegations of material fact are taken as true. Id. at 94. However, legally
26 conclusory statements, not supported by actual factual allegations, need not be accepted.
27 See Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). A motion to dismiss should be granted
28 if the complaint does not proffer enough facts to state a claim for relief that is plausible on

1 its face. See Twombly, 550 U.S. at 558-59. “[W]here the well-pleaded facts do not permit
2 the court to infer more than the mere possibility of misconduct, the complaint has alleged –
3 but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” Iqbal, 556 U.S. at 679.

4 Save Mart argues that because plaintiffs have not alleged that Save Mart is an
5 owner, operator, lessor, or lessee of the kiosks, they cannot state a claim against Save
6 Mart under Title III of the ADA.

7 ADA Title III provides that

8 [n]o individual shall be discriminated against on the basis of disability in the
9 full and equal enjoyment of the goods, services, facilities, privileges,
10 advantages, or accommodations of any place of public accommodation by
any person who owns, leases (or leases to) or operates a place of public
accommodation.

11 42 U.S.C. § 12182(a); see Lonberg v. Sanborn Theaters, Inc., 259 F.3d 1029, 1033-36,
12 amended on denial of reh'g and reh'g en banc, 271 F.3d 953 (9th Cir. 2001).

13 Here, Save Mart contends, the only allegation against it is that it “provides” the
14 kiosks at its stores, and that Save Mart stores are one of many places where “Redbox
15 kiosks are physically located.” In addition, Save Mart asserts, the complaint relies on an
16 Agreement between Redbox and Save Mart that explicitly provides that Redbox – and
17 Redbox alone – owns and operates the kiosks.

18 Save Mart requests the court to take judicial notice of the Agreement, and contends
19 that the Agreement disclaims any nature of ownership by Save Mart, and makes it clear
20 that Save Mart does not lease the kiosks from Redbox. Thus, Save Mart argues, neither
21 the allegations in the complaint nor the Agreement itself creates a reasonable inference
22 that Save Mart owns the kiosks, operates the kiosks, leases the kiosks from Redbox, or
23 leases the kiosks to Redbox.

24 Save Mart asserts that at most, plaintiffs’ allegations amount to a contention that
25 Save Mart provides space for some of the kiosks within its stores. Save Mart argues that
26 under Lonberg, the mere provision of space is not sufficient to subject Save Mart to liability
27 unless Save Mart is also the owner or lessor/lessee or operator of the challenged facility
28 itself. Save Mart contends that those who do not control the challenged facility cannot be

1 held liable under the ADA.

2 Save Mart also argues that injunctive relief against Save Mart – the only relief
3 available under the ADA – would be meaningless, because injunctive relief can be imposed
4 only against the person in control of the non-compliant facility, and Save Mart does not
5 control the design or operation of the kiosks, and has no power to change them.
6 Finally, Save Mart contends that the dismissal should be with prejudice, because
7 amendment would be futile, and that the court should also dismiss the state law claims
8 because they are predicated upon and redundant with their federal claim under the ADA.

9 In response, plaintiffs argue that Save Mart has mischaracterized the allegations in
10 the complaint. Plaintiffs' position is that Save Mart's stores are places of public
11 accommodation; that the Redbox kiosks – which they identify as "rental establishments" –
12 are one of the services, privileges, facilities, advantages or accommodations that are
13 offered at the Save Mart stores; and that Save Mart is liable under ADA Title III for
14 providing the inaccessible kiosks. Plaintiffs assert that this is sufficient for purposes of
15 pleading an ADA Title III violation.

16 Plaintiffs contend that it would be improper for the court to take judicial notice of the
17 Agreement, but also argue that the Agreement does not absolve Save Mart of its liability
18 under Title III. Plaintiffs assert that if an owner or operator of a place of public
19 accommodation enters into a contract with a third party to provide goods or services at the
20 place of public accommodation, and the third party does so in a way that discriminates on
21 the basis of disability, then the owner or operator is liable under Title III for discrimination
22 on the basis of disability.

23 Alternatively, plaintiffs argue that Save Mart is also liable as a lessor, because the
24 Agreement makes clear that Save Mart leases space to Redbox, and that Redbox operates
25 a place of public accommodation. Plaintiffs assert that pursuant to DOJ regulations, while
26 a landlord and a tenant may allocate responsibility between themselves for complying with
27 particular ADA provisions, such an agreement has no effect on the rights of third parties,
28 and both landlord and tenant are fully liable for compliance with all provisions of the ADA.

1 Nevertheless, they contend that they did not allege in the complaint that Save Mart is an
2 owner, operator, lessor, or lessee of the Redbox kiosks because the validity of their claims
3 against Redbox does not rely on that allegation.

4 With regard to Save Mart's argument regarding injunctive relief, plaintiffs contend
5 that as the owner/operator of its supermarkets, Save Mart has complete control over all the
6 goods and services it offers within the store. Thus, plaintiffs assert, Save Mart can require
7 Redbox, or any other operator of services within its supermarkets, to ensure that its
8 services are accessible.

9 The two main issues raised by this motion are whether plaintiffs can state a claim
10 against Save Mart under ADA Title III for failing to provide accessible kiosks, and, if so,
11 whether it is possible for Save Mart to provide meaningful relief to remedy the alleged
12 violation. While the court finds Save Mart's arguments to be more persuasive, on balance,
13 the court does not agree that the ADA claim against Save Mart can be dismissed with
14 prejudice on a Rule 12(b)(6) motion.

15 To state a claim under Title III of the ADA, a plaintiff must allege that he is disabled
16 within the meaning of the ADA; that the defendant is a private entity that owns, leases, or
17 operates a place of public accommodation; and that the plaintiff was denied public
18 accommodations by the defendant because of his disability. Arizona ex rel. Goddard v.
19 Harkins Amusement Enters., Inc., 603 F.3d 666, 670 (9th Cir. 2010); see also Young v.
20 Facebook, Inc., 790 F.Supp. 2d 1110, 1114-15 (N.D. Cal. 2011).

21 The court agrees with Save Mart that plaintiffs have not alleged that Save Mart
22 owns, operates, or leases the challenged place of public accommodation, such that it can
23 be liable under Title III for the inaccessibility of the kiosks. Thus, the first element is not
24 met. Plaintiffs' theory of the case appears to be either that Save Mart leases the space to
25 Redbox, and thus leases the public accommodation, or that Save Mart owns and operates
26 the supermarkets where the kiosks are located, and thus the kiosks are a service, privilege,
27 facility, accommodation, or advantage of the Save Mart supermarkets.

28 However, the major point that Save Mart argues here – that the Agreement

1 establishes that it is not an owner, operator, or lessor/lessee of the Redbox kiosks – raises
2 factual issues that are not appropriate for consideration in a 12(b)(6) motion. Moreover, the
3 court does not agree that the Agreement can be judicially noticed.

4 The general rule is that the court may not look beyond the four corners of the
5 complaint in ruling on a Rule 12(b)(6) motion, with the exception of documents incorporated
6 into the complaint by reference, and any relevant matters subject to judicial notice. Swartz
7 v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007); Lee v. City of Los Angeles, 250 F.3d 668,
8 688-89 (9th Cir. 2001).

9 Under the doctrine of incorporation by reference, the court may consider on a Rule
10 12(b)(6) motion not only documents attached to the complaint, but also documents whose
11 contents are alleged in the complaint, provided the complaint “necessarily relies” on the
12 documents or contents thereof, the document’s authenticity is uncontested, and the
13 document’s relevance is uncontested. Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038
14 (9th Cir. 2010); see Lee, 250 F.3d at 688-89. The purpose of this rule is to “prevent
15 plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting documents upon
16 which their claims are based.” Swartz, 476 F.3d at 763.

17 In general, the court may take judicial notice of matters that are either generally
18 known within the trial court’s territorial jurisdiction, or capable of accurate and ready
19 determination by resort to sources whose accuracy cannot reasonably be questioned. Fed.
20 R. Evid. 201(b).

21 Here, the court does not agree with Save Mart that the Agreement is “referenced” in
22 the complaint, or even that it should be “incorporated by reference.” Indeed, the complaint
23 does not even mention the Agreement, and is silent on the precise nature of the
24 relationship between Save Mart and Redbox. Nor can the Agreement be judicially noticed
25 pursuant to Rule 201(b).

26 The court can perhaps take judicial notice of the fact of the Agreement, as the
27 complaint does allege that Redbox and Save Mart are separate entities, and that Save Mart
28 “provides” Redbox kiosks for customers in most of its California supermarkets, which

1 suggests that there is some sort of business arrangement between the two defendants.
2 However, it is impossible to determine the exact nature of that relationship without
3 interpreting the Agreement. More to the point, the question whether plaintiffs can maintain
4 an ADA Title III claim against Save Mart based on the allegedly inaccessible kiosks cannot
5 be resolved without – at a minimum – interpreting the Agreement.

6 As for the question whether any injunctive relief plaintiffs might obtain from Save
7 Mart would be “meaningful” in the sense of remedying the inaccessible kiosks, the sole
8 remedy available under the ADA is injunctive relief, and it may well be that Save Mart is not
9 in a position to comply with an order directing that the kiosks be made accessible.
10 Nevertheless, the court finds that this issue cannot be resolved in the present motion, again
11 because it is largely dependent on the development of a factual record.

12 Finally, having found that the ADA claim against Save Mart cannot be dismissed
13 with prejudice, the court does not address the arguments regarding the state law claims.

14 Based on the uncertain status of the ADA claim against Save Mart, as explained
15 above, the court finds that the best and most efficient course would be to DENY the motion
16 to dismiss, and to schedule the matter for an early summary judgment motion.
17 Accordingly, no later than June 4, 2012, the parties shall submit a stipulation regarding a
18 proposed schedule for briefing an early summary judgment motion by Save Mart.

19 The May 30, 2012 hearing date is VACATED.
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21 **IT IS SO ORDERED.**

22 Dated: May , 2012



23 PHYLIS J. HAMILTON
24 United States District Judge
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